The Scottish Independence Referendum

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The Scottish Independence Referendum: Quo Caledonia (Angliaque)? – Robert Lane

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(https://eapcrcdpdotblogdotgencatdotcat.files.wordpress.com/2014/07/escocia-1.jpg)The Scottish independence referendum has now come and gone. Two years (or 307) in the making, the public debate was at times uninformed and glib, and marked occasionally by scaremongering, but it rose latterly to an admirable degree of maturity of substance. It was certainly spirited. Voter turnout, long an embarrassment in the United Kingdom at all levels of government, was an enthusiastic 84.6 percent. It attracted the interest not only of the usual suspects (the Catalans, the Basques, the Bavarians, the Québécois) but globally: Edinburgh was visited by a team of campaigners from Okinawa come to observe the event.

In the event the 'no' side prevailed, by a margin of 55.3 to 44.7 percent. So at least for a while, the matter is settled. But there remains even in the aftermath a host of questions, which were never satisfactorily answered, as to what would happen had Scots seized their chance. And this is because the best we can do is conjecture. The dissolution of a state is certainly not unprecedented, but the complex of international treaty obligations which bind the United Kingdom, especially its membership of the European Union, and the competing claims made and simplistic (mis)information bruited as part of the referendum debate as to the outcome of a 'yes' vote, frequently put with great assurance but with little authority or even evidence of

forethought, make clear the extent of confusion which was abroad, and remains still. The questions have not gone away: Scotland may have the opportunity at some time in the future 'tae think again' (a refrain from the (unofficial) national anthem Flower of Scotland), or they may bubble to the surface in some other member state in which a region chafes against a central authority. Scotland was the first forum but is not alone. It is the purpose of this note to lessen the confusion, to look at the issues to which the dismemberment of a member state of the EU gives rise in the Scottish context, and consider what might have been had the vote gone differently. Lessons may be learned which have a currency furth o' Scotland (as we say).

For purposes of the analysis I start with the assumption that, in a manner yet to be defined but in accordance with UK constitutional law, the United Kingdom is dismembered; that we are not looking at a Scottish unilateral declaration of independence ('UDI'), and that notwithstanding the 1706 Treaty of Union uniting the two kingdoms of Scotland and England 'for ever after … into One Kingdom',[1] there is no constitutional impediment, as there would be in some member states,[2] to the dissolution of the British state into constituent parts. Indeed it has happened before, in 1921 (the Irish republican view) or 1922 (the Imperial view) when the Irish Free State was carved out of the Hibernian part of the UK (evolving subsequently into the Republic of Ireland in 1937), even though Ireland and Great Britain were equally 'for ever after … united into one Kingdom';[3] and that the result will be two independent states iure gentium: (a) Scotland and (b) the remainder, presumably England, Wales and Northern Ireland, provisionally called 'rUK', for remainder, rest, or rump, UK. That result cannot be achieved by a repudiation of the 1706 Treaty because the parties to it have ceased to exist, and it could not in any event restore the status quo ante. Instead it will require some form of 'constitutional' legislation (a category legally unknown in UK law) with the collaboration of the Holyrood (Scottish) and Westminster (UK) parliaments. The thicket of UK constitutional/political issues which has got us to the referendum is unpicked fully by my colleague Navraj Singh Ghaleigh in his earlier contributions to this series (http://blocs.gencat.cat/blocs/AppPHP/eapc-rcdp/page/1/?s=navraj).[4] I proceed from that point, presume there was a 'yes' vote on 18 September, and my concern is what it would do for the future Scotland/rUK in terms of the present UK membership of the European Union.

It is a truth (almost) universally acknowledged, so clearly that no alternative course seems to have entered the minds of the politicians and commentators who espouse it, that rUK will succeed to all rights, privileges and obligations of the present United Kingdom, and Scotland will succeed to none. It means that rUK is the successor state to the present UK for purposes of membership of the EU, and Scotland will be on the outside, in the queue behind Turkey, Macedonia, Iceland, Montenegro and Serbia (all of which have candidate status) should it wish to seek (re-)admission to the Union. This is the view stated in peculiar interventions from both Mr Barroso ('I don't want to interfere [but it would be] extremely difficult, if not

impossible' for an independent Scotland to join the European Union)[5] and Mr van Rompuy, although neither has supplied any authority or justification for it,[6] and neither European Council President nor Commission president, even were these two gentlemen to remain in office, has much say in the matter. But it is also the more thoughtful and nuanced view of Professors Crawford and Boyle, published gratefully by the British government in 2013.[7] But think about it: what does it mean? Scotland and the Scots (but not England and the English), dutiful member of the Community/Union for 40 years and citizens of the Union for 20, are, as a result of scission of the UK, at a stroke cast from that high perch into the darkness. As put by Sir David Edward, the British judge in the Court of Justice from 1992 to 2004,

> *Then, at the midnight hour, all … would come abruptly to an end. The … acquis communautaire would no longer, as such, be part of the law of Scotland.*
> *Scotland would cease to be constrained in relation to the rates of VAT and corporation tax.*
> *Erasmus students studying in Scotland would become "foreign students" liable to pay full third country fees, as would students from England, Wales and Northern Ireland. Non-Scottish fishermen would be excluded from Scottish waters. And all the waters between Scotland and Norway would cease to be within the jurisdiction of the EU—an important security consideration quite apart from fishery rights.'[8]*

The geostrategic importance of Scotland is suddenly all the more pressing an issue with a resurgent Russia, 'though perhaps one more for NATO than the EU; although Scotland would, on this view, be free of the constraints of the Common and Foreign Security Policy (CFSP), and in the unlikely event of an ancient Scottish-Russian (military) friendship reasserting itself, the EU could not complain. In fact it would in that instant leave the Scottish-EU relationship a tabula rasa, so Scotland now equal in EU eyes, of all countries of Europe and of the Mediterranean littoral, only to Belarus and the Turkish Republic of Northern Cyprus. Quite a demotion from fully part of the Union a second before midnight. Is this really what Mr Barroso wants and expects?

The issues are certainly informed by principles of public international law. I am happy to accept the Crawford/Boyle analysis as a statement of international law, where recognition by third states is, whilst not an exact science, often constitutive of statehood. Taken to the next stage and membership of international organisations, I thus accept (or concede) that succession to, for example, the UK permanent seat in the UN Security Council (as was that of the Soviet Union)[9] and membership of NATO—certainly both weighty issues—would be determined in accordance with applicable rules of international law and, notwithstanding some precedents to the contrary, probably in favour of sole succession by rUK—what Crawford and Boyle call the 'continuator' state. This is what happened in 1921/22 (more accurately in 1931 when the legal status of the dominions was made clear by Statute of Westminster) with the Irish Free State, the UK (of Great

Britain and Northern Ireland) succeeding to UK (of Great Britain and Ireland) treaty rights and obligations, the Free State beginning with a clean slate. I accept too on balance the limited utility of the 1978 Vienna Convention on Succession of States in Respect of Treaties,[10] but not because it does not reflect customary international law, because, as Crawford and Boyle observe,[11] succession to an international organisation is to be determined rather on the basis of the particular constitution or rules of the organisation. Here they and I then part company, for, with respect, I do not think that they attend sufficiently to the constitution and rules of the Union and the peculiar 'new legal order of international law'[12] created by the Treaties, which 'albeit … in the form of … international agreement[s], none the less constitute … the constitutional charter' of the Union.[13] Nor do they take account of the likely view of the issues from the Kirchberg in Luxembourg, for it is the Court of Justice there, enjoying exclusive jurisdiction over disputes as to the interpretation and application of the Treaties,[14] and not its big brother in The Hague which will ultimately settle the matter. When it comes before it, as it can via a number of procedural avenues, and as it surely will, the Court will certainly take note of the UK (constitutional) legislation which effects the change, and applicable rules of public international law. But it will be informed, not governed, by them. The answer will lie rather somewhere in the Treaties and the law they create.

Precedent

The Treaties do not countenance, so have nothing directly to say about, the dismemberment of a member state. Yet there are precedents, of a sort, for a moving treaty frontier rule in Community/Union law, if none of them directly in point. Greenland quit the Community in 1985, Denmark stayed in, shorn of Greenland (and when Greenland left it took more than half of the territory of the Community with it); Saint-Barthélemy left in early 2012, France stayed in. These are similar precedents, and Greenland is frequently cited by both sides in the Scottish debate as authority for their respective cases. Each was an internal constitutional re-ordering (of the Danish *Rigsfælleskab* and the French Republic) and the cessation of the application of the Treaties to part (a non-European part) of the realm. Even so, Greenland secession was effected by formal treaty amendment in accordance with the then existing procedures:[15] it was universally accepted that this was necessary in order to give effect to the wishes of Greenlanders to leave, and that it was beyond the powers of Greenland and/or Danish authorities to do so unilaterally; and this even though no change was necessary, or made, to Danish representation in the institutions. Similarly, secession of Saint-Barthélemy was effected by a formal decision of the European Council,[16] using powers it now (since Lisbon) enjoys under the Treaties, to define their application to the overseas territories of a member state.[17]

More interesting, perhaps, is what happened to Saint-Barthélemy (and Saint-Martin) from 2007 to 2009: in 2007 an earlier constitutional reorganisation of the French overseas territories[18] saw both

withdraw from the administrative authority of Guadeloupe (*a département d'outre-mer*, or 'DOM'), each then becoming a *collectivité* (previously *territoire*) *d'outre-mer* ('COM'). A DOM forms part of the territory of the Union, a COM does not. So in quitting Guadeloupe (by virtue of a French law), Saint Barthélemy and Saint Martin either (a) seceded from the (then) Community or (b) did not, notwithstanding French law which severed them from Guadeloupe, in the absence of formal Community recognition of that fact. The situation was reversed (on supposition (a)) or formally reaffirmed (on supposition (b)) in 2009 by Lisbon which expressly recognised both, still COMs, to be part of Union territory[19]—a status Saint-Barthélemy (but not Saint-Martin) then relinquished in 2012. Did they leave the Community in 2007? No one appears to know, and/or no one appears to have noticed. Why? Well, they are far-flung territories of France (and of the Union). More important, none of it had any effect upon rights of citizenship, the peoples of these islands being fully French, and so Union, citizens, and no legal repercussion of the interregnum is recorded. And it is here the battle may be fought. If (a) is the correct interpretation of the events, it remains the sole instance of (temporary) departure of a territory from the Community by unilateral (French) act. But it still doesn't help us much here, because these are cases of part of a member state remaining part of a member state, but reverting to outside the Union—so in ways the opposite of our problem.

There are other, earlier precedents: the Saarland retroverting to Germany in 1956 and Algerian independence in the 1960s, by which then Community law was altered by national (respectively a French/German bilateral treaty[20] and, following the (civil) war of independence, approval of the Franco-Algerian Evian Accords[21]) action outwith that recognised by the Treaties, but these do not assist us here. On the other side of the coin was German reunification, when new territories (the DDR) and new citizens (18 million) were brought into the Community by unilateral German action. But Germany was a special case, in German constitutional law the DDR forming still part of the 1937 Reich (and here Mr Barroso *could* speak usefully of state continuity) even if a territory in which the Basic Law did not apply, and its citizens always German citizens (as defined by imperial nationality law[22] which as a matter of federal German law continued to apply to both Germanies).[23] Nor was the result contested by the other member states, and it was positively approved by all Community institutions (except the Court of Justice which was never asked its view). Now the Treaties provide expressly for the extension, by (unanimous) Council decision, of Union authority to the northern half of Cyprus should the island come to be reunified.[24] By comparison, in 2011 Mayotte acquired the status of a French département (previously a collectivité) d'outre-mer by French law[25] so by that law becoming an integral part of French territory but did not become part of the Union, that a matter reserved (by Lisbon) to the European Council by authority of and in conformity with the Treaties.[26]

Precedents therefore do not solve our problem. What of principles?

Principles

Whilst the Treaties are silent as to the dismemberment of a member state, they do address amendment of the Treaties (Article 48 TEU) and accession to the Union (Article 49). Procedures aside, the only material difference between the two is that the consent of the Parliament is necessary for accession, but not amendment, otherwise both require the unanimous consent of all member states and ratification by each of an agreed (by consensus) amendment/accession text in accordance with constitutional requirements. Much of the present debate centres upon whether the issue ought to be approached by the 'Article 48 route' (so, amendment of the Treaties, presumably negotiated concurrently with internal UK negotiations so that immediately following the midnight hour, the Treaties recognise a member state of Scotland and another of rUK) or 'the Article 49 route' (accession of a new state(s); which must necessarily follow the dissolution of the UK for accession is triggered only by application from a European state, and a European state which does not (yet) exist cannot apply). Here then a second difference: Article 48 would require negotiation with and consent of the present UK speaking for both the Scotland and rUK to come, Article 49 that of future state(s) post-independence—plus in both cases the consent of everyone else. And it must be observed that some other member states may, for their own reasons, be antipathetic to any automatic or speedy creation of two member states where once there was one.

But is Treaty change necessary at all? Previously, without question: dissolution of a member state could not of itself alter Treaty texts, and conjure from the ether another Commissioner, an extra judge, additional MEPs, and so on, from a (member) state not recognised by the Treaties. Having said that, much has changed since Nice. The hurdle at which treaty amendment often fell in the past (the Treaty of Amsterdam; first approval of the Constitutional Treaty) was the pivotal point of the weighting of QMV votes in the Council, upon which the honour of (some) member states seemed to turn. But no longer so, the old, hard arithmetic of QMV (a fixed weighting assigned each member state) being phased out from 2009 to 2017, the Treaties now providing for the higher calculus of majorities of Council members, of member states and of population.[27] The result is that one, or a hundred, new member states could join (or leave) the Union and require no amendment to these provisions. Similarly, since Nice the Court of Justice consists not of 7, 9, 11, 13 or 15 judges as previously[28] but 'one judge from each Member State',[29] the General Court of 'at least one judge per Member State',[30] the Court of Auditors 'one national of each Member State'[31] and following the fiasco of the Irish referendums on Lisbon, '[t]he Commission shall consist of a number of members … equal to the number of Member States'.[32] And so on. Again, addition, accession (or secession) of a member state, and these numbers adjust automatically, no Treaty amendment required. The composition of other bodies would require a positive act of adjustment, but that is a matter for the European Council (the Parliament[33]) or the Council (the Economic and Social Committee,[34] the Committee of the Regions[35]). In fact the only

Treaty provision which would require change is that fixing (by member state) the capital of the European Investment Bank.[36]

Except that the Treaties at present 'apply to … the United Kingdom of Great Britain and Northern Ireland', and say so expressly.[37] Would that require formal change? Here there is a new wild card introduced by Lisbon, recognising for the first time a right of a member state (unilaterally) to leave the Union (Article 50 TEU). Previously that possibility was a matter of close doctrinal debate, frequently pitting the more traditional constitutional lawyer against the Community iconoclast. Its inclusion by Lisbon (it grew out of the failed Constitutional Treaty) is puzzling. Nevertheless Article 50 immediately met the approbation of the *Bundesverfassungsgericht* in its consent to German ratification of Lisbon, calling it a principle of 'reversible autolimitation' (*umkehrbare Selbstbindung*) inherent in the *Staatenverbund* it recognises the Union to be.[38] The procedure set out requires negotiation between the seceding member state and the Union institutions (less the representatives of the former) in order to produce an agreed outcome, signed off on the Union side by the Council with the consent of the Parliament and presumably acquiring the status of an international treaty. Oddly the Council acts here by qualified majority and no ratification by the member states is required. But absent agreement, there is a right (in fact it is automatic unless time is extended by a unanimous European Council) of secession two years after first notification of the intention to secede.[39] No provision is made to address the legal vacuum which would follow.

What are the consequences of this? Does it mean, if a member state may withdraw unilaterally, it may unilaterally reconstitute itself for Union purposes? That if it is the will of the UK Parliament to eject Scotland from the UK and designate rUK to succeed to present UK membership, it would do great injury to the basic underpinning of the British state, but would it nevertheless be permissible and/or determinative? This of course is why the Scottish government was so careful that the referendum question should not be 'Would you like Scotland to withdraw from the United Kingdom?', the version pressed from London and bringing with it significant baggage. It raises the (unresolved) political question of who, post-referendum but re-independence, negotiates for rUK: does the UK government presume immediately to speak for rUK or will it retain a residual legal/democratic obligation to represent and support Scottish interests until the UK dies? And if the UK government does not/cannot speak for rUK, then who?

The automatic succession and creation of two member states from one, without formal adjustment of the Treaties, is probably a bridge too far. If the Treaties at present apply to the United Kingdom of Great Britain and Northern Ireland, and whilst (failing agreement) automatic succession to membership by its constituent parts following its dissolution would extend or diminish neither the territorial application of the Treaties nor the number of citizens enjoying their benefits—which the Crawford/Boyle thesis would

do—and there is no practical question of Scottish or rUK adaptation to the *acquis communautaire*, it having formed the law of both for over 40 years, if the precedents teach us anything it is that this result cannot be achieved by the unilateral action of a member state. This is the lesson of the Greenland case. Counted against it is the converse precedent of German reunification and the fact the Treaties now clearly countenance, in Article 50 TEU, operation of the Union and its machinery with a (fewer) number of member states different from that provided for and recognised by the Treaties. But in the face of antipathy from some member states, albeit a political more than a legal consideration, the automatic solution will likely be resisted.

But that is not the end of what the Treaties can tell us. They contain fundamental rules different from those obtaining in earlier, simpler times. First is the issue of citizenship: as citizens of a member state, Scots are citizens of the Union. Citizenship, as we know from the slow-fuse bombshell of *Grzelczyk*, is 'destined to be the fundamental status of nationals of the Member States'.[40] For Advocate-General Sharpston this is van Gend en Loos mark II:

> *'The consequences of that statement are, I suggest, as important and far-reaching as those of earlier milestones in the Court's case-law. Indeed, I regard the Court's description of citizenship of the Union in Grzelczyk as being potentially of similar significance to its seminal statement in Van Gend en Loos.'[41]*

Can a Scot be deprived of that status by a unilateral act of his or her (present) member state?

Citizenship in the UK is at the moment a matter 'reserved' to the Westminster Parliament.[42] Presumably we shall have, post-independence, a status of a citizen of Scotland, as defined by law,[43] and a new rUK Nationality/Citizenship Act making similar provision, as the Westminster Parliament sees fit, for its citizens. Will citizens of Scotland, erstwhile British citizens, Union citizens, cease to be Union citizens when the Scottish constitution presumes, and directs,[44] otherwise? Can this Union status be taken from them, and without Union consent? Yes, Union citizenship is derivative, depending (at least for now) wholly upon the fact of citizenship of a member state,[45] and member states retain the right unilaterally to determine who is a citizen 'for Union purposes';[46] and the very concept has become cheapened by the willingness of some member states to sell citizenship (and so Union citizenship) for cash. But if the Court is right in *Grzelczyk*, is it a status and privilege which can be so easily cast off? Even if it were to come to Article 48 agreement, Scots may be at the mercy of the UK Parliament, but some member states with not distant memories of citizens being involuntarily stripped of that status might have something to say.

Two further, related Treaty provisions: Lisbon wrote formally into the Treaties, at the head of the TEU amongst basic principles defining the mutual obligations of 'Union fidelity' (*Unionstreue*), a Union commitment to 'respect [for] the equality of member states before the

Treaties' (Article 4(2)). Would it be consistent with this principle to recognise part of a dismembered member state carrying on as before, whilst excluding the same treatment to the other part; against the wishes of its people, citizens of the Union all? Combine this with the older (introduced by Maastricht but beefed up by Lisbon) provision requiring the Union to respect the national identities of the member states 'inherent in their fundamental structures, political and constitutional' (also Article 4(2)), the 'identity clause' recognised by the Polish *Trybunał Konstytucyjny* now to be 'the principal axiological basis of the European Union',[47] and it follows that the Union is required to respect the stateless nations within the Union, including, amongst many, Scotland; and that when such a nation seeks to exercise its right to self-determination (for the Union, we learn from Lisbon, is 'founded on the values of … democracy')[48] and becomes, or proposes to become, a state, it is incumbent upon the Union, in EU law (and in international law in which it is embedded), to facilitate the participation of that nation/state in the Union, and certainly not banish it to the darkness against its (democratic) will. And, if I wished to be mischievous, I would add that this is a principle which cannot apply to rUK, for rUK is not a nation.

This is all played against a background of Scottish support for the Union and, to put it at its highest, English ambivalence. There is the looming 'in-out' referendum Mr Cameron has promised following his nebulous 'renegotiation' of the Treaties, as the Conservative Party tacks ever more anti-European in its attempts to see off the loons of the UK Independence Party (Ukip)—which, after all, won both the popular vote and the largest number of seats in Strasbourg in the 2014 election on the back of English enthusiasm.[49] Had the referendum gone differently it would be entertaining if rUK found itself in the position widely attributed to Scotland, and had to decide in the present political climate there whether to (re-)apply for membership. As it is, Scotland is now yoked to England for purposes of the 2017 referendum, but an English 'yes' and a Scottish 'no' to secession from the Union—the former a distinct possibility, the latter a certainty —could re-ignite the independence issue phosphorus bright.

But that has little to do with the legal issues. Which remain: in the event of UK dismemberment nowhere is it justified in EU law that rUK has a superior claim to Scotland to succeed to the present UK's membership. Principles of Union law articulated in Article 4(2) TEU and the 'fundamental status' of Union citizenship enjoyed now by all Scots and all English/Welsh/Northern Irish militate convincingly against it. Upon dissolution and absent an agreed solution (which complies with Union law), therefore either (a) both are out, for neither is recognised by the Treaties, facing a long Article 49 march to get back in; if dissolution is characterised as secession from the Union in the sense of Article 50 this is clearly necessary for the Treaties say so expressly;[50] or (b) both are in, each a successor state. It is to be conceded that that multiple (legal) problems disappear if the Crawford/Boyle analysis is correct: that rUK alone is the continuator state of the UK and Scotland starts anew. But being the easy option does not make it right. It could be argued that to proceed to

dissolution without a negotiated settlement would be an infringement of the Treaty duty of 'sincere cooperation' (*cooperation loyale*; also Article 4(2)) on the part of the UK; Article 50 seems to present support both for (the compulsory two year cooling-off period) and against (automatic independence/expulsion thereafter) this. But sincere cooperation can operate horizontally too. The dissolution of the UK founded in a democratically clear and constitutionally correct Scottish drive to independence would therefore result in a legal obligation for all member states (and Union institutions) to cooperate in good faith to produce a satisfactory result. And this would apply both before and after the independence genie was out of the bottle.

Whether Scotland and/or rUK could claim a right of succession to any or all of the present UK's extensive 'opt-outs' from Treaty obligations, notably the third stage of economic and monetary union (shared with Denmark), the area of freedom, security and justice (Denmark and Ireland) and Schengen (Ireland) seems unlikely under the Article 49 route, and other member states equally unlikely to be sympathetic; but it would doubtless go into the Article 48 negotiation pot. Without settlement they are terms which are part of the package of Treaty rights and obligations borne by the UK, and the better course seems to be their continuation by its successor states. Less certain are Scottish/rUK claims to an equitable, or any, share of the UK's budget 'rebate' (or 'correction'), worth €5.3 thousand million in 2014,[51] not a Treaty requirement but adopted by Council decision which requires unanimity to change,[52] but up for renegotiation for 2014-20. Its very existence is increasingly contested, with increasing bitterness, by other member states. But on present analysis Scotland would be no less entitled to any of these things than rUK, which would also have to make the case for their continuation.

The light has been dimmed, not extinguished, in Scotland for a while. Some of the issues discussed are peculiar to the UK, and not just the half in/half out status it has negotiated for itself over the years. Scotland is a fundamental building block of the UK, half of the basic contract which led to the creation of Great Britain in 1707, and it is unthinkable that a United Kingdom, or a Great Britain, could survive without it. The same would likely to apply mutatis mutandis to Belgium. Whether or not other member states—and of course Spain and the future of Catalunya spring first to mind—could claim the same is less certain. That aside, the analysis, it is submitted, holds true for them. The test of it may be played out elsewhere.

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[1] Treaty of Union of 1706 (the exact date contentious as the two countries used different calendars), art. 1. The Treaty was given effect by legislation adopted by the parliaments of each country and came into force on 12 May 1707 (according to the Gregorian (Scottish) calendar).

[2] For example, owing to § 79 III GG there is probably no

constitutionally permissible means by which the German Federal Republic could be dissolved.

[3] Union with Ireland Act 1800 (GB), art. 1st; Act of Union (Ireland) 1800 (Irl), art. 1st.

[4] 'Constitutional Vectors and the Scottish Independence Referendum 2014', Parts I and II; posted 14 and 15 July 2014.

[5] From an interview on The Andrew Marr Show, BBC Television, 16 February 2014.

[6] Mr Barroso ascribes his proposition to the principle of state continuity without explaining how that principle applies here.

[7] J Crawford and A Boyle, Opinion: Referendum on the Independence of Scotland – International Law Aspects, being Annex A to Scotland Analysis: Devolution and the Implications of Scottish Independence, published by HM Government in February 2013.

[8] David Edward, Scottish Constitutional Futures Forum Blog, posted 17 December 2012.

[9] The Russian Federation (previously the Russian Soviet Federative Socialist Republic) succeeded to the Soviet Union's UN membership and permanent seat in the Security Council without formality. It was uncontested by the 14 other Soviet republics or by the larger international community. It is unlikely Scotland would contest an rUK claim to the permanent seat, still less likely claim its own permanent seat resulting from the dissolution of the UK. Whether the UK (or rUK) should have a permanent seat in the Security Council is another matter.

[10] Convention of 23 August 1978, 1946 UNTS 3; in force 1 November 1996, art. 16; discussed in Crawford and Boyle, n. 7 above, at paras 119-133. Only six EU member states (the Czech Republic, Estonia, Croatia, Cyprus, Slovakia, Slovenia) have ratified the Convention; Poland and the German Democratic Republic signed but never ratified it.

[11] Crawford and Boyle, n. 7 above, at para. 125.

[12] Case 26/62 Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1, at 12.

[13] Opinion 1/91 Re the EEA Agreement [1991] ECR I-6079, at para. 21; more recently Cases C-402 and 415/05P Kadi and Al Bakaraat v Council and Commission (Kadi II) [2008] ECR I-6351, at para. 281; recognised by the Bundesverfassungsgericht as early as 1967: BVerfGE 22, 293 (296).

[14] TFEU, art 344.

[15] See Treaty of 13 March 1984 amending, with regard to Greenland,

the Treaties establishing the European Communities OJ 1985 OJ L29/1; in force 1 February 1985.

[16] Decision 2010/718 OJ 2010 L325/4.

[17] TFEU, art. 355(6).

[18] Loi organique no. 2007–223 du 21 février 2007 portant dispositions statutaires et institutionnelles relatives à l'outre-mer 2007, JO du 22 février 2007, p. 3220.

[19] TFEU, art. 355(1).

[20] Vertrag vom 27. Oktober 1956 zur Regelung der Saarfrage, BGBl. 1956 II S. 1589. In fact this affected only the Coal and Steel Community, the two Rome Treaties not yet signed. Yet on the same day the ECSC member states signed a treaty amending (minimally) the ECSC Treaty so as to recognise the cession (Traité de 27 octobre 1956 portant modification au Traité CECA, 416 UNTS 1965), but owing to delay in Italian and Dutch ratification the latter entered into force only in October 1958. Thus it was maybe the case that for the first 9 months of the Economic and Atomic Energy Communities, the two countries were differently constituted for their purposes than they were for the Coal and Steel Community.

[21] Accord Cessez-le-feu en Algérie du 18 mars 1962 (Les Accords d'Évian). The process was (notwithstanding French constitutional law) best characterised as one of decolonisation, conferring upon Algeria the option of the 'clean slate' rule and unilateral denunciation of French treaty obligations.

[22] Reichs- und Staatsangehörigkeitsgesetz (RuStAG) vom 22. Juli 1913, RGBl. 1913 S. 583; now significantly amended in the light of reunification by the Gesetz zur Reform des Staatsangehörigkeitsgesetz vom 15. Juli 1999, BGBl. 1999 I S. 1618.

[23] See BVerfG, 31. Juli 1973 (Grundlagenvertrag), BVerfGE 36, 1.

[24] 2003 Accession Treaty, Protocol No. 10 on Cyprus, art. 1(2).

[25] Loi organique no. 2010–1486 du 7 décembre 2010 relative au Département de Mayotte, JO du 8 décembre 2010, p. 21458.

[26] Thus Mayotte, becoming a département in 2011, retained temporarily its existing status as an overseas country or territory (OCT) outwith the Union until absorbed into it as an outermost region (OMR) by European Council decision (Decision 2012/419 OJ 2012 L204/131) with effect from 1 January 1914.

[27] See TEU, art. 16; TFEU, art. 238; Protocol (No 36) on Transitional Provisions; Declaration [No 7] on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union; Decision 2009/859 OJ 2009L314/73.

[28] EEC Treaty, art. 165, 1st para as it was 1958-72, 1973-80, 1981-85,

1986-93; then EC Treaty, 1993-94, 1995-99 and art. 221, 1st para, 1999-2003.

[29] TEU, art 19(2), 1st para.

[30] TEU, art 19(2), 2nd para. The Treaties allowing a variable number of judges (beyond a minimum equalling the number of member states), the number is fixed now (at 28) by the Statute of the Court, but that can (now) be altered by the ordinary legislative procedure (TFEU, art. 281). In 2011 the Court proposed the number be increased to 39, but the Parliament and Council have not acted to do so.

[31] TFEU, art. 285.

[32] European Council Decision 2013/272 OJ 2013 L165/98, art. 1.

[33] TEU, art. 14(2); subject to a Treaty ceiling of 751 members.

[34] TFEU, art. 301.

[35] TFEU, art. 305.

[36] Protocol (No 5) on the Statute of the European Investment Bank, art. 4.

[37] TEU, art. 52(1).

[38] BVerfG, 30. Juni 2009 (Lissabon-Vertrag), BVerfGE 123, 267 (349).

[39] TEU, art. 50(3).

[40] Case C-184/99 Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, at para. 31; repeated frequently by the Court, most recently in Case C-270/13 Haralambidis v Casilli, pending, per AG Wahl at para 51 of his opinion.

[41] Case C-34/09 Ruiz Zambrano v Office national de l'emploi [2011] ECR I-1177, at para. 68 of her opinion.

[42] Scotland Act 1998, s. 30 and Sched 5, Part II, s. B6.

[43] See the draft Scottish Independence Bill (a proposed constitution to apply from independence until adoption of a permanent constitution following proposals put forward by a constitutional convention), s. 18, which envisages a Scottish citizenship adhering automatically to (a) any British citizen (i) born in Scotland or (ii) ordinarily resident there at 'Independence Day'; (b) any person born in Scotland on or after Independence Day if either of his or her parents is a Scottish citizen or has indefinite leave to remain (which reflects present UK law, except 'settled' rather than enjoying indefinite leave to remain; British Nationality Act 1981, s. 1(1)); and (c) any person born outside Scotland on or after Independence Day if either of his or her parents holds Scottish citizenship. Further provision, including extension of citizenship to others with a prescribed connexion to Scotland supplementing, qualifying or

modifying s. 18, is to be provided by law.

[44] See the Scottish Independence Bill, ibid., s. 25: 'A person holding Scottish citizenship is also, in accordance with Article 20.1 of the Treaty on the Functioning of the European Union, a citizen of the European Union'.

[45] See TFEU, art. 20(1).

[46] See Final Act of the Maastricht IGC, Declaration (No 2) on Nationality of a Member State.

[47] K 32/09, Wyrok z dnia 24 listopada 2010 r. (Traktat z Lizbony), 2010 Nr 229, poz. 1506, at para 2.1

[48] TEU, art. 2.

[49] Ukip won 29.2% of the popular vote in England but only 10.5% in Scotland.

[50] See art. 50(5) TEU: 'If a state which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49'.

[51] Definitive Adoption of the European Union's general budget for the financial year 2014, OJ 2014 L51, p. I/15.

[52] Decision 2007/436 OJ 2007 L163/17 (sixth own resources decision'), arts. 4, 5. A proposal for amendment is now before the Council; Doc 5466/14.

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